INDEX

	Page
Opinions of the lower courts	1
Jurisdiction	2
The question presented	2
The constitutional provisions	3
Statement	3
Summary of argument	6
Argument	
I. The evidence obtained by means of the "wire-tapping" operations of the Federal prohibition agents was inadmissible unless these operations constitute an "unreasonable search and seizure" within the meaning of the fourth amendment	7
II. The "wire-tapping" operations of the Federal prohibition agents were not a "search and seizure" in violation of the security of the "persons, houses, papers, and effects" of the petitioners in the constitutional sense or within the intendment of the fourth amendment	12
Origin of the fourth amendment	13
Decisions of this court	18
State cases	34
Principles of construction	35
General considerations and conclusion	38

CITATIONS

Cases

Adams v. *New York*, 192 U. S. 585	9, 12, 21
Agnello v. *United States*, 269 U. S. 20	10, 29
Amos v. *United States*, 255 U. S. 313	11
Boyd v. *United States*, 116 U. S. 616	9, 15, 19, 20, 26
Brindley v. *State*, 190 Ala. 43	34
Burdeau v. *McDowell*, 256 U. S. 465	26, 27
Byars v. *United States*, 273 U. S. 28	11, 29
Carroll v. *United States*, 267 U. S. 132	28, 29
Entick v. *Carrington*, 19 Howell's State Trials, 1029	20
Evernole v. *State*, 106 Tex. Crim. Rep. 507	35
Gouled v. *United States*, 255 U. S. 298	10, 24, 25
Harris, Bankrupt, Matter of, 221 U. S. 274	32, 33
Hester v. *United States*, 265 U. S. 57	12, 27
Holt v. *United States*, 218 U. S. 245	32
Jackson, Ex parte, 96 U. S. 727	18

Cases—Continued. Page
Johnson v. *United States*, 228 U. S. 457 ..... 32, 33
Kothe v. *United States*, 16 F. (2d) 59 12
Lake County v. *Rollins*, 130 U. S. 662 30
Leatherman v. *State*, 11 Ga. App. 756 34
Marron v. *United States* (decided November 21, 1927) (No. 185, October term, 1927) 11, 32
McGuire v. *United States*, 273 U. S. 95 ..... 12, 30
Ogden v. *Saunders*, 12 Wheat. 213 35
People v. *Mayen*, 188 Cal. 237 30
Perlman v. *United States*, 247 U. S. 7 23
Planters Bank v. *Sharp*, 6 How. 301 37
Silverthorne Lumber Company v. *United States*, 251 U. S. 385 ..... 10, 24
Smith v. *United States*, 2 F. (2d) 715 35
State v. *Aime*, 62 Utah 476 9
State v. *Hester*, 137 S. C. 145 34
State v. *Minneapolis M&R Co.*, 124 Minn. 34 34
State v. *Owens*, 302 Mo. 348, Ann. 32 A. L. R. 383 9
Stroud v. *United States*, 251 U. S. 15 23
Twining v. *New Jersey*, 211 U. S. 78 8
United States v. *Mandel*, 17 F. (2d) 270 12
United States v. *Lee*, 274 U. S. 559 31
Weeks v. *United States*, 232 U. S. 383 ..... 10, 22

Textbooks, etc.:
Annals of Congress, vol. 1, col. 434; col. 754 17
Am. Bar Assn. Journal, vol. 8, p. 479 (August, 1922) 9
Beveridge's Life of Marshall, vol. 1, p. 440 16
Blakemore on Prohibition (2d ed.), p. 519 et seq. 9
Channing's History of the United States, vol. 3, pp. 1-5, 114 16
Cooley's Constitutional Limitations (8th ed.), vol. 1, p. 612 15
Cornelius on Search and Seizure, p. 45 9
Jones, Commentaries on Evidence (2d ed.), vol. 5, sec. 2075 et seq.; vol. 6, sec. 2474 ..... 8, 9, 12
Journal of the Convention of Virginia, p. 34 17
May's Constitutional History of England, p. 110 et seq., p. 245 et seq. 15
Story on Constitution (5th ed.), vol. 1, sec. 406 ..... 35, 36

Constitution of the United States—
Fifth amendment 3
Fifth amendment 3
7 Geo. III, Cap. 46 15

In the Supreme Court of the United States

OCTOBER TERM, 1927

No. 493

ROY OLMSTEAD, JERRY L. FINCH, CLARENCE G. Healy, Cliff Maurice, Tom Nakagawa, Edward Engdahl, Myer Berg, John Earl, and Francis Richard Brown, petitioners

v.

UNITED STATES OF AMERICA

No. 532

CHARLES S. GREEN, EMORY A. KERN, Z. J. HEDRICK, Edward Erickson, William P. Smith, David Trotsky, Louis O. Gilliam, Clyde Thompson, and B. G. Ward, petitioners

v.

UNITED STATES OF AMERICA

No. 533

EDWARD H. MCINNIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS OF THE LOWER COURTS

The opinions of the Circuit Court of Appeals are reported in 19 F. (2d), at pages 842 and 850. The

opinions of the District Court on preliminary matters are reported as follows: Upon motions to strike pleas in abatement, 7 F. (2d) 756; upon demurrers to the indictment, 5 F. (2d) 712; upon petition to quash search warrant, to return property and to suppress evidence, 7 F. (2d) 700.

JURISDICTION

The judgments of the Circuit Court of Appeals were entered May 9, 1927 (R. 780; S. 596.)[1] Rehearings were denied July 18, 1927. (R. 781; S. 597.) The petition for certiorari in No. 493 was filed August 30, 1927, and in Nos. 532 and 533 September 9, 1927. The petitions were denied by orders entered November 21, 1927. Petition for rehearing in No. 533 was denied by order entered January 3, 1928. Upon a similar petition filed in No. 532 all three petitions were reconsidered and an order made January 9, 1928, granting the writs. Jurisdiction to issue a writ is conferred by Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

THE QUESTION PRESENTED

The order granting the writs expressly limits their consideration to the single question of—

> whether the use of evidence of private telephone conversations, between the defendants

[1] NOTE.—There are three petitions, docketed as Nos. 493, 532, and 533. The latter two are upon the same record, differing somewhat from the record in No. 493. For convenience in reference the letter "R" will be used to refer to the record in No. 493 and the letter "S" to the record in Nos. 532 and 533.

and others, intercepted by means of wire tapping, is a violation of the Fourth and Fifth Amendments and, therefore, not permissible in the Federal courts.

THE CONSTITUTIONAL PROVISIONS

Petitioners rely upon the Fourth and Fifth Amendments to the Constitution. The Fourth is:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The relevant portion of the Fifth is:

> No person * * * shall be compelled in any criminal case to be a witness against himself * * *.

STATEMENT

The petitioners were convicted in the District Court of the United States for the Western District of Washington of a conspiracy to violate the National Prohibition Act by possessing, transporting and importing intoxicating liquors and maintaining common nuisances, and by selling intoxicating liquors in violation of the Act. (R. 250-254; S. 45-49.) Of seventy-two others jointly indicted with the petitioners, some were not apprehended,

some were acquitted, others pleaded guilty. The cases being carried to the Circuit Court of Appeals upon writs of error, the judgments of the District Court were affirmed. Petitions for rehearing were denied. (R. 781; S. 597.) In petitioning this Court for writs of certiorari, Edward H. McInnis filed a separate petition, docketed as No. 533, the others dividing into two groups, nine joining in the petition docketed as No. 493 and nine others joining in the petition docketed as No. 532.

The evidence in the records discloses an illegal liquor business of amazing magnitude, involving the employment of two seagoing vessels for the transportation of liquor from Scotland to British Columbia, the employment of smaller vessels for coastwise transportation to the State of Washington, the use of a large underground cache out of Seattle and a number of smaller caches in the city for retail purposes, the maintenance of a central office manned with operators, the employment of executives, salesmen, deliverymen, dispatchers, scouts, bookkeepers, collectors, and an attorney. Monthly transactions reached as high as $176,000. (R. 169–182; 216–231; 480; S. 380–384, and see District Court's summary of the evidence to the jury, R. 717–732.)

It is not possible to clearly make out from the record the exact relationship of each of the petitioners to the organization. It appears that some of the petitioners had a proprietary interest in the

business while others were salaried employees. At one time, according to testimony, it was agreed that a capital fund should be made up by a contribution of $10,000 by the petitioner Olmstead and contributions of $1,000 each by eleven others, and that the profits were to be divided one-half to Olmstead and the remaining half to the other eleven. Those appearing to have a proprietary interest include six of the petitioners, viz: Olmstead, Gilliam, Ward, Berg, Earl, and Trotsky. (R. 169–189; 380–384; S. 380–384.)

The information which led to the discovery of the conspiracy and its nature and extent was in large part obtained through the wire-tapping operations of four Federal prohibition officers. Taps were made of the telephone wires leading from the residences of four of the petitioners and were also made from the wires leading from the office of the organization, 1025 Henry Building. The houses with which connections were thus made were those of Olmstead, Elbro, Green, Finch and Fletcher, all of whom are numbered among the petitioners except Elbro and Fletcher. The taps apparently were made in all cases without trespass upon any property of the petitioners, for example, the taps to the Henry Building office were made one from the basement and one from a toilet room. The house taps appear to have been made from the street. (R. 196–197; S. 192, 267, 286, 310, 322, 330, 331, 338, 368, 390.) The testimony of the prohibition agents

as to the conversations between the petitioners thus overheard by them extends through a large part of the records and includes testimony as to conversations by all of the petitioners with the exception of Ward and Erickson. These telephone conversations related to the various phases and details of the liquor business being carried on by the organization and were in furtherance of that business. The greater portion of them came from the Henry Building office. One of the overt acts charged in the indictment was the maintenance at 1025 Henry Building of a nuisance by their keeping, selling and bartering intoxicating liquors. (R. 435, 518, 580, 631; S. 267, 286, 344, 381, 390.) There is no evidence that this office was ever used or intended for any purpose other than to carry on the organization's illegal liquor business.

SUMMARY OF ARGUMENT

It was a general rule at common law that the admissibility of evidence offered in a criminal case was not affected by illegality of the means employed in obtaining it. The use of evidence illegally obtained was not deemed to be in violation of the common law rule against self-incrimination, of which the Fifth Amendment is but a concrete expression, nor did it violate any other right of the accused. The exceptions to this rule are foreign to the case at bar. This rule of the common law has been modified by decisions of this Court to the extent of holding that evidence procured in viola-

tion of the "search and seizure" clause of the Fourth Amendment is inadmissible under the Fifth Amendment. Except for this modification the common law rule still prevails. The "wire-tapping" evidence is therefore admissible unless it offends the Fourth Amendment. By no reasonable construction of this Amendment can it be extended to apply to oral statements or conversations surreptitiously overhead without physical invasion or trespass upon the property of the accused. There is nothing in the history of the Amendment to support a claim for so broad a construction, and the language of the Amendment does not permit it.

ARGUMENT

I

The Evidence Obtained by Means of the "Wire-Tapping" Operations of the Federal Prohibition Agents Was Admissible Unless These Operations Constitute an "Unreasonable Search and Seizure" Within the Meaning of the Fourth Amendment

The Fifth Amendment can only be invoked by first showing that there has been a violation of the Fourth Amendment. The third clause of the Fifth Amendment "nor shall be compelled in any criminal case to be a witness against himself" merely gave constitutional sanction to a rule of common law well established at the time the Constitution was adopted.

Jones, Commentaries on Evidence (2d Ed.), Vol. 6, Sec. 2474;

Twining v. *New Jersey*, 211 U. S. 78.

Obviously the case at bar has nothing to do with the provision against self-incrimination in its original and primary sense, that is, the compulsion of the accused by legal process to produce in court evidence either testimonial or physical. Ordinarily evidence of incriminating oral statements made by the accused before, during, or after the commission of a crime, overheard by a witness and testified to by him in court, is always competent.

This is too elementary to require discussion. The only inhibition against evidence in this form is that which forbids evidence of extorted confessions. Here there was neither extortion nor confession. There was no coercion, threat or promise. Moreover, the conversations were not in the nature of confessions. They consisted of the oral giving and taking of orders for intoxicating liquors, the direction of the business, inquiries as to the progress of shipments, and the like. They were a part and parcel of the criminal transaction. The prohibition officers, relating in court what they overheard, were testifying as immediate witnesses of the crime as much so as would be a witness who testified to having seen liquor delivered and the price paid.

Aside from the rule against duress of legal process and extorted confessions, it was a fundamental and time-honored rule of common law that evidence was not rendered inadmissible in a criminal case by

illegality of the means by which it was obtained. This rule of the common law is still in force in England and Canada and in a majority of the States. The illegality dealt with in many of the State cases was the violation of constitutional rights under provisions of State constitutions substantially identical with the Fourth Amendment.

> Jones, Commentaries on Evidence (2d Ed.), Vol. 5, Chap. 22;
>
> Blakemore on Prohibition (2d ed.), p. 519 et seq.
>
> Cornelius on Search and Seizure, p. 45;
>
> "Use of Evidence Obtained by Illegal Search and Seizure," Vol. 8, Am. Bar Assn. Journal, p. 479, Aug. 1922, where the English, Canadian, and all Federal and State cases are collected;
>
> *State* v. *Arme*, 62 Utah 476;
>
> *State* v. *Owens*, 302 Mo. 348; Ann. 32 A. L. R. 383.

The States which have departed from the common law rule have done so under the influence of *Boyd* v. *United States*, 116 U. S. 616, and later decisions of this Court, which will be considered hereafter.

This common law doctrine once received the approval of this Court in *Adams* v. *New York*, 192 U. S. 585, in which, assuming that the Fourth and Fifth Amendments applied to the action of State officers, the Court held that no constitutional right of the accused had been violated.

Prior to the *Adams case* it had been held in *Boyd* v. *United States, supra*, that the compulsory production of a man's books and papers to be used in evidence against him in a criminal proceeding was equivalent to an "unreasonable search and seizure" prohibited by the Fourth Amendment, and was therefore a violation of the self-incrimination prohibition of the Fifth Amendment.

In *Weeks* v. *United States*, 232 U. S. 383, there was again presented the question of admissibility of evidence seized in violation of the Fourth Amendment. No criticism was made of the approval of the common law rule in the *Adams case*, but deeming the basis of the rule to be the avoidance of collateral issues in the trial of criminal cases this Court held that the case was taken out of the rule by an application made to the court below before trial for the return of the goods wrongfully seized, and the evidence was held inadmissible.

Silverthorne Lumber Co. v. *United States*, 251 U. S. 385, was on this point differentiated from the *Adams case* on the authority of the *Weeks case*.

In *Gouled* v. *United States*, 255 U. S. 298, it was held that where the defendant first learned during the progress of the trial of a seizure in violation of the Fourth Amendment, objection to the evidence then was timely and well taken.

Agnello v. *United States*, 269 U. S. 20, held that the rule of the *Adams case* did not apply where by

the uncontradicted facts it appeared that the proffered evidence had been seized in violation of the Fourth Amendment.

The holding in *Amos* v. *United States*, 255 U. S. 313, is similar to that in the *Agnello case*.

In *Byars* v. *United States*, 273 U. S. 28, a motion for a return of the evidence had been made before trial, and it was held that this laid proper foundation for objection upon the trial.

Finally in *Marron* v. *United States* (decided Nov. 21, 1927, No. 185, Oct. Term, 1927) this Court declared broadly:

> It has long been settled that the Fifth Amendment protects every person against incrimination by the use of evidence obtained through search or seizure made in violation of his rights under the Fourth Amendment.

In the light of these decisions it is not open to question that evidence obtained by Federal officers in violation of the Fourth Amendment is inadmissible as evidence in criminal trials in Federal courts. To that extent the common law rule and anything said to the contrary in the *Adams case* has been abandoned.

The limits of this departure from the common law rule are, however, definite. The reason for it appears to be the close interrelation that is conceived to exist between the Fourth and the Fifth Amendments. It has never been extended to evidence obtained illegally in the general sense, but

only where the illegality amounts to a violation of the Fourth Amendment. Evidence obtained by trespass, by fraud, by unethical or even criminal methods is admissible if the Fourth Amendment be not violated.

> Jones on Evidence (2d Ed.), Vol. 5, Sec. 2075 et seq.;
> *Adams* v. *New York*, *supra*;
> *Hester* v. *United States*, 265 U. S. 57;
> *McGuire* v. *United States*, 273 U. S. 95;
> *Koths* v. *United States*, 16 F. (2d) 59 (9th Cir.);
> *United States* v. *Mandel*, 17 F. (2d) 270 (D. C. Mass.).

The Fifth Amendment therefore is not involved in this case, unless it can be invoked as a result of a violation of the Fourth Amendment.

II

THE "WIRE-TAPPING" OPERATIONS OF THE FEDERAL PROHIBITION AGENTS WERE NOT A "SEARCH AND SEIZURE" IN VIOLATION OF THE SECURITY OF THE "PERSONS, HOUSES, PAPERS, AND EFFECTS" OF THE PETITIONERS IN THE ORIGINAL SENSE OR WITHIN THE INTENDMENT OF THE FOURTH AMENDMENT.

If the "wire-tapping" operations of the prohibition agents, involving no entry of the petitioner's houses, constitute a "search and seizure" violating the security of the "persons, houses, papers" or "effects" of the petitioners, such search and seizure was unreasonable. There was no warrant.

There were no circumstances authorizing a search without warrant according to the rules of the common law or any statute of the United States. The search, if "search" there was, had for its object the detection of crime and the acquisition of evidence.

ORIGIN OF THE FOURTH AMENDMENT

An examination of the historical background of the Fourth Amendment leaves no doubt but that the adoption of this Amendment was the direct consequence of two abuses practiced by the English Government—the use of general warrants and the use of writs of assistance. Some writers have seen an additional influence in the "letters de cachet" which were still in use in France at the time of the American Revolution and which were even more vicious in character than the general warrants or writs of assistance.

General warrants had been used by the English sovereigns for more than a century prior to the celebrated Wilkes case in 1763. Their most notable employment during the preceding period was for the suppression of seditious libels against the government. The warrants commanded the officers to whom they were directed to search and seize disloyal writings and their authors, without limit as to the place or person or particular description as to the object of the search. Armed with these warrants the officers went about on their "roving com-

mission," guided by idle rumor and common gossip, invading houses, seizing private books and papers and arresting persons at will. The practice culminated in the famous cases of John Wilkes and John Entick. They are typical of what was then common. The former was the author of the "North Briton," the latter of the "Monitor," both attacking the Government.

Lord Halifax, secretary of state in 1763, issued a warrant to four messengers "to make strict and diligent search for the authors, printers, and publishers of the North Briton, No. LXV, and to apprehend and seize them, together with their papers, and bring them in safe custody before him." The publisher was then unknown. Forty-nine persons were arrested on suspicion. Wilkes was seized, his house ransacked, and all of his private papers were taken. He was convicted of publishing a seditious libel, but later turned on his accusers, sued civilly for false arrest, and secured verdicts of damages against Lord Halifax and his messengers. It was held that the general warrants under which his house was raided and he was arrested were illegal. A similar history is presented by the case of John Entick, publisher of the "Monitor." There was a like arrest and seizure and ensuing action for damages this time for trespass against the king's messengers, resulting in recovery. Lord Camden pronounced an elaborate judgment holding the warrant illegal. The judgment is quoted at length in the opinion in *Boyd* v.

United States, supra. These two cases in their criminal and civil aspects attracted universal attention and aroused tremendous opposition to the use of general warrants, resulting in their condemnation by the courts and a declaration of their illegality by the House of Commons.

May's Constitutional History of England, p. 110, et seq., p. 245, et seq.:
Cooley's Constitutional Limitations, 8th Ed., Vol. 1, p. 612;
Boyd v. *United States, supra;*
19 How. State Trials, pp. 1029 and 1153.

The use of writs of assistance in the American colonies was expressly authorized by an Act of Parliament of 1767 (7 Geo. III, Cap. 46) entitled "An act for granting certain duties in the British colonies and plantations in America * * * and for more effectually preventing the clandestine running of goods in the said colonies and plantations." The Act authorized the superior or supreme court of justice in the several plantations to grant writs of assistance authorizing customs officials "to enter and go into any house, warehouse, shop, cellar, or other place, in the British colonies or plantations in America, to search for and seize prohibited or uncustomed goods" in the manner directed by the Acts of 14 Charles II and 7 and 8 William III, which authorized the searcher, in case of resistance, to break open doors, chests, and trunks. The most oppressive use of this writ was commenced in 1760, when William Pitt determined to

enforce the Sugar Act of 1733, which, among other things, provided a prohibitive duty on molasses brought into the northern colonies from other than British plantations, of which there had been extensive importations principally for distillation into rum, used by the colonies as a currency in their fur and other trade.

The use of the writs soon led to great public agitation and opposition, particularly in Massachusetts, led by James Otis, but their use continued to the outbreak of the Revolution. Channing's History of the United States, Vol. III, pp. 1–5 and 114. Knowledge and apprehension of these abuses—warrants and writs—was fresh in the minds of the colonial statesmen when it came to framing the Constitution. In the Virginia convention Patrick Henry, opposing the adoption of the Constitution, declared that without a bill of rights "excisemen may come in multitudes * * * go into your cellars and rooms, and search, and ransack, and measure, everything you eat, drink, and wear * * *." (Beveridge's Life of Marshall, Vol. I, p. 440.) The Virginia Constitution had already adopted a bill of rights, of which Section 10 was as follows:

> That general warrants, whereby an officer or messenger may be commanded to search suspected places without evidence of a fact committed, or to seize any person or persons not named, or whose offense is not

> particularly described and supported by evidence, are grievous and oppressive, and ought not to be granted.

An amendment to the Federal Constitution similar to this was proposed by the Virginia ratification convention. (*Journal of the Convention of Virginia*, p. 34.) As introduced by James Madison at the first session of Congress it read:

> The right of the people to be secured in their persons, their houses, their papers, and their other property from all unreasonable searches and seizures, shall not be violated by warrants issued without probable cause, supported by oath or affirmation, or not particularly describing the places to be searched, or the persons or things to be seized. [Annals of Congress, vol. I, col. 434.]

A committee of one member from each State was appointed to consider and report such Amendments as ought to be proposed by Congress to the legislatures of the States. In the report of this committee was proposed an Amendment differing but slightly from that originally proposed by Madison. The word "effects" was substituted for the words "other property." Mr. Gerry, saying that he presumed there was a mistake in the wording of the clause, moved that it be amended to read:

> The right of the people to be secured in their persons, houses, papers, and effects against unreasonable seizures and searches * * *. [Annals of Congress, vol. I, col. 754.]

The Amendment came out of conference committee in its present form, and we have no light as to the reason for the further change in phraseology.

It is quite apparent that the principal, if not the sole, peril in the minds of those who advocated the Amendment and against which its protection was intended was the use of general warrants and the writs of assistance.

DECISIONS OF THIS COURT

A brief review will now be made of the decisions of this Court construing the Fourth Amendment in relation to the use of evidence obtained in violation of its "search and seizure" clause, mainly to show the limits within which the Amendment has been applied rather than with the thought that any of the decisions included are decisive of the case now before the Court.

In *Ex parte Jackson*, 96 U. S. 727, the defendant had been convicted of depositing in the mail a circular advertising a lottery, in violation of Section 3894, Revised Statutes. His sole contention was that the Act was unconstitutional. This Court held otherwise. In the opinion it was said that the constitutional guaranty against unreasonable searches and seizures extended to sealed letters and packages being transported in the course of the mails, and that while in the mail such sealed matter can be opened and examined only under proper warrant

issued, but that the officers of the Postal Service in many instances can act upon their own inspection where the matter is unsealed and exposed to view and shows unmistakably that it is prohibited.

Boyd v. *United States*, 116 U. S. 616, is the leading case on search and seizure. There was an information against thirty-five cases of plate glass alleged to have been imported with fraudulent evasion of the tariff duty, the Act of June 27, 1874, providing in such cases for fine and forfeiture of the goods. (18 Stat. 186.) This Act also authorized the courts of the United States, in all suits and proceedings, other than criminal, arising under the revenue laws of the United States, on motion of the Government to require the defendant or claimant to produce all of his books, invoices or papers alleged by the Government attorney to contain any evidence for the Government, according to his belief; upon failure to produce, the allegations of the Government stood confessed. Custody of the records and documents produced was to remain in the defendant subject to the order of the court and subject to the right of the Government attorney to examine and offer in evidence. Under this Act the claimant was required to produce the invoice of the goods for inspection, and being produced they were received in evidence over the claimant's protest. This Court held the Act to be unconstitutional as applied to a suit for forfeiture of goods, as being repugnant to the Fourth and Fifth Amendments to the

Constitution. In its opinion the Court, speaking by Mr. Justice Bradley, expressed the view that (p. 622)—

> a compulsory production of a man's private papers to establish a criminal charge against him, or to forfeit his property, is within the scope of the Fourth Amendment to the Constitution, in all cases in which a search and seizure would be,

and that such compulsory production was equivalent to a search and seizure. The origin of the Fourth and Fifth Amendments was traced historically to the experience of the English people and colonists with general warrants and writs of assistance. Great importance was attributed to the judgment of Lord Camden in *Entick* v. *Carrington*, 19 Howell's State Trials, 1029. The intimate relation between the Fourth and Fifth Amendments was emphasized, the Court observing (p. 633):

> They throw great light on each other. For the "unreasonable searches and seizures" condemned in the Fourth Amendment are almost always made for the purpose of compelling a man to give evidence against himself, which in criminal cases is condemned in the Fifth Amendment; and compelling a man "in a criminal case to be a witness against himself," which is condemned in the Fifth Amendment, throws light on the question as to what is an "unreasonable search and seizure" within the meaning of the Fourth Amendment.

The opinion contains some sweeping statements, which have ever since been the favorite resort of all litigants who have sought to extend the scope of the Fourth Amendment.

In *Adams* v. *New York*, 192 U. S. 585, the defendant had been convicted of operating a lottery in violation of a statute of the State of New York. Officers under a search warrant seized not only the lottery paraphernalia described in the warrant, but also other private papers of the defendant, which were used in evidence to identify the defendant's handwriting. Having come up on writ of error this Court assuming, without deciding, that the Fourth and Fifth Amendments applied to the action of State officers, concluded that there had been no violation of these Amendments, apparently taking the view that the seizure of the private papers was a reasonable incident to the execution of the warrant. The Court in its opinion, referring to the Fourth and Fifth Amendments, said (p. 598):

> The origin of these amendments is elaborately considered in Mr. Justice Bradley's opinion in the *Boyd case*, *supra*. The security intended to be guaranteed by the Fourth Amendment against wrongful search and seizure is designed to prevent violations of private security in person and property and unlawful invasion of the sanctity of the home of the citizen by officers of the law, acting under legislative or judicial sanction,

> and to give remedy against such usurpations when attempted. But the English and nearly all of the American cases have declined to extend this doctrine to the extent of excluding testimony which has been obtained by such means, if it is otherwise competent.

In *Weeks* v. *United States*, 232 U. S. 383, a defendant was convicted of using the mails for transporting lottery coupons and tickets in violation of Section 213 of the Criminal Code. After his arrest police officers went to his house, obtained a key, entered and search his rooms and seized various papers and articles, which were turned over to the United States marshal. Later the same officers returned with the marshal to search for additional evidence and seized certain letters and envelopes. There was no search warrant. The letters thus seized were used in evidence. In this Court the judgment was reversed upon the ground that the illegal search and seizure violated the rights of the defendant under the Fourth and Fifth Amendments. With reference to the Fourth Amendment, the Court, by Mr. Justice Day, said in its opinion (p. 390):

> * * * it took its origin in the determination of the framers of the Amendments to the Federal Constitution to provide for that instrument a Bill of Rights, securing to the American people, among other things, those safeguards which had grown up in England to protect the people from unreasonable

> searches and seizures, such as were permitted under the general warrants issued under authority of the Government, by which there had been invasions of the homes and privacy of the citizens and seizure of their private papers in support of charges, real or imaginary, made against them. Such practices had also received sanction under warrants and seizures under the so-called writs of assistance, issued in the American colonies.

Perlman v. *United States*, 247 U. S. 7. During the pendency of an equity suit Perlman produced in evidence, as part of his testimony, certain papers, models, etc., owned by him. They were impounded as exhibits and subsequently delivered without his consent to the district attorney, by whom they were proposed to be used as evidence against him in a prosecution for perjury. The appeal was from the denial of a petition of Perlman to restrain such use. The order was affirmed. Perlman's contention was that the impounding and use of the exhibits by the United States before the grand jury constituted an unreasonable seizure and made him a compulsory witness against himself, in violation of the Fourth and Fifth Amendments. This Court said (p. 15):

> * * * their production was voluntary, no form of constraint or compulsion or extortion was put upon him, and that some one of them must exist is the test of immunity.

In *Stroud* v. *United States*, 251 U. S. 15, it appeared that a prisoner committed murder in a peni-

tentiary. He subsequently wrote certain letters, which, under the practice of the institution, were turned over to the warden, who furnished them to the district attorney, who in turn used them as evidence of his guilt in the prosecution for the homicide. It was held that there was no unreasonable search or seizure and no violation of the constitutional prohibition against self-incrimination.

In *Silverthorne Lumber Co.* v. *United States*, 251 U. S. 385, there was an indictment against the two Silverthornes, officers of the Lumber Company. While they were detained in custody a representative of the Department of Justice, without warrant or authority, went to the office of the company and made a clean sweep of all of its books, papers, and documents found there. They were used as evidence before the grand jury, and photographs and copies were made. An application for their return was then granted, but the photographs and copies were impounded by the court. Later the Silverthornes were subpœnaed to produce the originals, an order made that the subpœna be complied with, and upon refusal of compliance judgment of contempt was entered against them. This judgment was reversed upon the ground that the rights of the corporation against unlawful search and seizure had been violated.

In *Gouled* v. *United States*, 255 U. S. 298, it appeared that Gouled was convicted of being a party to a conspiracy to defraud the United States, and of having used the mails to promote a scheme

to defraud the United States, in violation of Sections 37 and 215 of the Criminal Code. Previous to the indictment, and when Gouled was under suspicion, a representative of the Intelligence Department, an acquaintance of Gouled, under guise of a friendly call, gained admission to his office, and in his absence, without warrant, seized and carried away a document having evidential value only, which was delivered to the district attorney and put in evidence over Gouled's objection that it was obtained in violation of the Fourth and Fifth Amendments, a contention which was sustained in this Court. Extracts from the opinion follow (p. 306):

> * * * whether entrance to the home or office of a person suspected of crime be obtained by a representative of any branch or subdivision of the Government of the United States by stealth, or through social acquaintance, or in the guise of a business call, and whether the owner be present or not when he enters, any search and seizure subsequently and secretly made in his absence, falls within the scope of the prohibition of the Fourth Amendment.

It was held that under such circumstances the use in evidence of a document thus obtained was a violation of the Fifth Amendment.

> In practice the result is the same to one accused of crime, whether he be obliged to supply evidence against himself or whether such evidence be obtained by an illegal search of his premises and seizure of his private

> papers. In either case he is the unwilling source of the evidence, and the Fifth Amendment for bids that he shall be compelled to be a witness against himself in a criminal case (p. 306).
>
> That the papers involved are of no pecuniary value is of no significance. Many papers, having no pecuniary value to others, are of the greatest possible value to the owners and are property of the most important character (p. 310).

Amos v. *United States*, 255 U. S. 313, dealt with a case where two deputy revenue collectors went to defendant's house in his absence, told his wife that they were revenue officers and had come to search the premises for violation of the revenue law, whereupon they were admitted, searched the house, and found certain whiskey, which was introduced in evidence in prosecution of the defendant. This Court held that there was a plain violation of the Fourth and Fifth Amendments and that there was no waiver of the defendant's rights by the admission to his house by his wife because of the implied coercion, even though it were possible for a wife thus to waive her husband's constitutional rights.

In *Burdeau* v. *McDowell*, 256 U. S. 465, certain books and papers were stolen from the defendant and turned over to the Department of Justice. The District Court, upon defendant's application, made an order for their return to the defendant and enjoined their use by the Department of Jus-

tice as evidence against him in criminal proceedings. The order was reversed. This Court held that the use of the books and papers in evidence would not under the circumstances infringe upon the defendant's constitutional rights for the reason that the Government had not participated in the original wrongful seizure, saying (p. 475):

> * * * it was the purpose of the Fourth Amendment to secure the citizen in the right of unmolested occupation of his dwelling and the possession of his property, subject to the right of seizure by process duly issued.
>
> In the present case the record clearly shows that no official of the Federal Government had anything to do with the wrongful seizure of the petitioner's property * * *. * * * whatever wrong was done was the act of individuals in taking the property of another. * * *

In *Hester* v. *United States*, 265 U. S. 57, it appeared that revenue officers testified to finding moonshine whiskey in a broken jug and other vessels near the house where the defendant resided and as to suspicious conduct of the defendant there observed. The Court, assuming that the premises on which the revenue officers had found the evidence and observed the defendant were his property, held that nevertheless the evidence was admissible, saying (p. 58):

> It is obvious that even if there had been a trespass, the above testimony was not obtained by an illegal search or seizure. The

> defendant's own acts, and those of his associates, disclosed the jug, the jar and the bottle—and there was no seizure in the sense of the law when the officers examined the contents of each after it had been abandoned. This evidence was not obtained by entry into the house and it is immaterial to discuss that. The suggestion that the defendant was compelled to give evidence against himself does not require an answer. * * * the special protection accorded by the Fourth Amendment to the people in their "persons, houses, papers, and effects" is not extended to open fields.

In *Carroll* v. *United States*, 267 U. S. 132, it was held that the search without a warrant of an automobile and seizure of liquor found in it in the course of transportation in violation of the Prohibition Act did not violate the Fourth Amendment, if the search and seizure was made upon probable cause. In the opinion by Chief Justice Taft it was said (p. 153):

> * * * the guaranty of freedom from unreasonable searches and seizures by the Fourth Amendment has been construed, practically since the beginning of the Government, as recognizing a necessary difference between a search of a store, dwelling house or other structure in respect of which a proper official warrant readily may be obtained, and a search of a ship, motor boat, wagon or automobile, for contraband goods, where it is not practicable to secure a war-

> rant because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought.

Concerning the construction of the Fourth Amendment it was further said (p. 149):

> The Fourth Amendment is to be construed in the light of what was deemed an unreasonable search and seizure when it was adopted, and in a manner which will conserve public interests as well as the interests and rights of individual citizens.

In *Agnello* v. *United States*, 269 U. S. 20, it was held that the right to search which is incidental to a lawful arrest can not be extended to a search of the dwelling house of the person arrested several blocks from the place of arrest after the offense has been committed and while he is in custody elsewhere; that the seizure of evidence upon such search violated the Fourth Amendment, and its admission upon the criminal trial was a violation of the Fifth Amendment.

> It is well settled that, when properly invoked, the Fifth Amendment protects every person from incrimination by use of evidence obtained through search or seizure made in violation of his rights under the Fourth Amendment. (p. 33.)

In *Byars* v. *United States*, 273 U. S. 28, it appeared that certain State officers, about to make a search under a warrant for "intoxicating liquors and instruments and materials used in the manu-

facture of such liquors," were upon their invitation joined by a Federal prohibition agent, who in the course of the search found counterfeit strip stamps, which were used as evidence in a prosecution of the owner, resulting in his conviction. The judgment was reversed upon the ground that the stamps were obtained by unconstitutional search and seizure.

McGuire v. *United States*, 273 U. S. 95. Revenue agents, acting under a warrant, searched defendant's premises, discovering intoxicating liquor. Two bottles were taken as evidence and, wholly without authority, the rest destroyed. On the trial the two bottles were received in evidence over objection, it being contended by the defendant that on account of the unauthorized destruction of the liquor the officers became trespassers *ab initio* and lost the protection of the search warrant, and that in consequence the bottles were taken in violation of the Fourth Amendment and their reception in evidence was in violation of the Fifth Amendment. The conviction was upheld, the Court taking the view that whether or not the officers were trespassers *ab initio* was immaterial. The opinion has this pertinent language (p. 99):

> Even if the officers were liable as trespassers ab initio, which we do not decide, we are concerned here not with their liability but with the interest of the Government in securing the benefit of the evidence seized, so far as may be possible without sacrifice of the

> immunities guaranteed by the Fourth and Fifth Amendments. A criminal prosecution is more than a game in which the Government may be checkmated and the game lost merely because its officers have not played according to rule. The use by prosecuting officers of evidence illegally acquired by others does not necessarily violate the Constitution nor affect it admissibility.

The case of *United States* v. *Lee*, 274 U. S. 559, involved the search and seizure by a coast guard patrol boat of an American motor boat beyond the twelve-mile limit on the high seas for violation of the revenue laws. The patrol drew up alongside the motor boat and threw a searchlight upon her deck. Cans of alcohol were discovered. Two of the occupants of the motor boat were convicted of conspiracy to violate the Tariff and Prohibition Acts. The Circuit Court of Appeals vacated the judgment on the ground that evidence had been admitted which was obtained by an illegal search and seizure. This Court granted a writ of certiorari and reversed the order vacating the judgment. Incidental to its decision this Court held that there had been no "search" on the high seas. It said (p. 563):

> But no search on the high seas is shown. The testimony of the boatswain shows that he used a searchlight. It is not shown that there was any exploration below decks or under hatches. For aught that appears, the cases of liquor were on deck and, like the defendants, were discovered before the motor

boat was boarded. Such use of the searchlight is comparable to the use of a marine glass or field glass. It is not prohibited by the Constitution.

In *Marron* v. *United States*, decided by this Court November 21st last, it appears that officers engaged in the search of premises for intoxicating liquor under a warrant arrested one engaged in the act of making sales. It was held that as an incident to the arrest the officers might seize ledgers and bills which were a part of the outfit or equipment actually used in the business, though not on the person of the one arrested or in his immediate possession or control. The contention that the Fourth Amendment had been violated was not sustained.

Three cases of some interest, in which claims were made under the Fifth Amendment only, are:

Holt v. *United States*, 218 U. S. 245;

Matter of Harris, Bankrupt, 221 U. S. 274;

Johnson v. *United States*, 228 U. S. 457.

The *Harris* and *Johnson* cases involved the question of whether books and records of a bankrupt, transferred to the trustee pursuant to a requirement of the Bankruptcy Act, could be taken from the trustee by the prosecuting attorney and used as evidence in a criminal prosecution of the bankrupt. This right was affirmed in both cases. In the *Harris* case the Court said (p. 279):

> The right not to be compelled to be a witness against oneself is not a right to appropriate property that may tell one's story.

And in the *Johnson case* (pp. 458, 459):

> A party is privileged from producing the evidence but not from its production. * * *
>
> * * * If the documentary confession comes to a third hand *dio intuita*, as this did, the use of it in court does not compel the defendant to be a witness against himself.

In searching the foregoing decisions for a precedent to apply in the case at bar we are at once met by the lack of analogy. The *Lee case* comes nearest to furnishing one, and there it was held that there was no violation of constitutional rights. In every case in which a violation of the Fourth Amendment was found to have occurred the decision without exception dealt with a case in which the object of the search and seizure condemned was literally described by the language of the Amendment; that is, "persons, houses, papers, and effects," "effects" used in the sense of tangible personal property. In no case was there involved anything of the nature of oral communications or conversations. The Circuit Court of Appeals spoke advisedly when it said of the Fourth and Fifth Amendments that their protection "has never been extended to the exclusion of evidence obtained by listening to the conversation of persons at any place or under any circumstances." (R. 768.)

STATE CASES

Little help is found in the State decisions. There are three dictaphone cases, in which constitutional rights appear not to have been considered, probably because no one thought such a claim would be sound.

In *State* v. *Hester*, 137 S. C. 145, evidence of a conversation between the defendants overheard by a jailor through the installation of a dictaphone in the prison cells occupied by the defendants was held admissible as against the objection that such statements were not free and voluntary and the objection that the defendants were entrapped by artifice.

Brindley v. *State*, 193 Ala. 43, was a similar case in which dictaphone evidence was held properly received, but the court appears to have considered it only from the standpoint of its competence and probative value.

The same is true of *State* v. *Minneapolis Milk Co.*, 124 Minn. 34, where detectives testified as to proceedings of a meeting of milk dealers overheard by placing a dictaphone in the wall of the room where the meeting was held.

In *Leatherman* v. *State*, 11 Ga. App. 756, evidence of the commission of a crime, obtained by placing a searchlight through a broken pane in the window of the defendant's house, was held not inadmissible as having been obtained in violation of

the defendant's constitutional right to be protected from an illegal search.

In *Eversole* v. *State*, 106 Tex. Crim. Rep. 567, a witness secreted himself in a barn of the defendant and gave evidence of acts of the defendant done therein and observed by him. It was held that there was no violation of the search and seizure law of Texas forbidding search of a "private residence, actual place of habitation, place of business, person or personal possessions" without a search warrant.

In *Smith* v. *United States*, 2 F. (2d) 715, the Circuit Court of Appeals for the Fourth Circuit held that the turning of a flashlight on the floor of an open automobile by Federal officers was not a "search." The court observed (p. 716):

> A search implies some exploratory investigation.

PRINCIPLES OF CONSTRUCTION

In *Ogden* v. *Saunders*, 12 Wheat. 213, Chief Justice Marshall, concerning the principles of construction which ought to be applied to the Constitution of the United States, said (p. 332):

> To say, that the intention of the instrument must prevail; that this intention must be collected from its words; that its words are to be understood in that sense in which they are generally used by those for whom the instrument was intended; that its provisions are neither to be restricted into in-

> significance, nor extended to objects not comprehended in them, nor contemplated by its framers—is to repeat what has been already said more at large, and is all that can be necessary.

Story on the Constitution (5th ed.), Vol. I, Sec. 405:

> Where its words are plain, clear, and determinate, they require no interpretation. * * * Where the words admit of two senses each of which is conformable to common usage, that sense is to be adopted which, without departing from the literal import of the words, best harmonizes with the nature and objects, the scope and design, of the instrument.

In *Lake County* v. *Rollins*, 130 U. S. 662, construing the Constitution of the State of Colorado, Mr. Justice Lamar, writing for this Court, said (p. 670):

> To get at the thought or meaning expressed in a statute, a contract or a constitution, the first resort, in all cases, is to the natural significance of the words, in the order of grammatical arrangement in which the framers of the instrument have placed them. If the words convey a definite meaning which involves no absurdity, nor any contradiction of other parts of the instrument, then that meaning, apparent on the face of the instrument, must be accepted, and neither the courts nor the legislature have the right to add to it or take from it.

In *Boyd* v. *United States*, *supra*, the Court said that the judgment of Lord Camden in *Entick* v. *Carrington* might be considered as sufficiently explanatory of what was meant by unreasonable searches and seizures, and Chief Justice Taft in the *Carroll case* has already been quoted as saying that the Fourth Amendment is to be construed in the light of what was deemed an unreasonable search and seizure when it was adopted.

This Court has frequently said that the Fourth and Fifth Amendments should be construed liberally, but it is submitted that by no liberality of construction can a conversation passing over a telephone wire become a "house," no more can it become a "person," a "paper," or an "effect." "Effects" is the least definite of the four words. This Court has said of "effects" that—

> when the word is used alone, or *simpliciter*, it means all kinds of personal estate * * *. But if there be some word used with it, restraining its meaning, then it is governed by that, or means something *ejusdem generis*. [*Planters Bank* v. *Sharp*, 6 How. 301, 321.]

Giving to the word its literal import, the sense in which it is generally understood, its natural significance taken in connection with the context in which it appears, it does not seem possible to include within its meaning anything other than tangible personal property or to extend it to include a telephone conversation or any intangible

right of privacy of the parties with respect to such conversation.

Tapping a telephone wire running to a business office at a point in the office building outside of the office it serves does not involve a search or seizure of persons or houses nor of papers or effects of the subscriber. Tapping a residence telephone line at a point on the public highway, or at any point outside the dwelling, does not involve a search or seizure of persons, or of papers and effects of the subscriber, nor does it involve a search of a house, unless the telephone wire belonging to the telephone company at all points between the company's switchboard and the dwelling it serves is considered a part of the dwelling.

GENERAL CONSIDERATIONS AND CONCLUSION

Petitioners are urging the extension of the Fourth Amendment into a new field, the limits of which are difficult to define. If evidence obtained by tapping telephone wires at points not in private dwellings is excluded on constitutional grounds, on the same principle would not all manner of evidence gathered by ruse or entrapment have to be excluded? Suppose an officer obtains access to a telephone on a party line and listens to incriminating conversations of other parties having telephones on the line; suppose instead of tapping a wire he goes to the telephone exchange and with or without permission of the operator plugs in on a private

line and listens; suppose he leases an office and puts a dictaphone in the wall of the adjoining office and listens; suppose without trespassing he is able to put his ear to the keyhole of the door of an office or house and listens; suppose he pretends to join a conspiracy and thereby gains access to the inner councils of the conspirators and hears the hatching of their criminal schemes. These examples, varying into slight shades of distinction, might be multiplied indefinitely to show the extremes to which the principle contended for would lead. Once cut loose from the fair literal import of the language of the amendment, and there is no place to anchor.

In the construction of the Amendment a balance should be sought between that which will preserve the fundamental safeguard which the Amendment was designed to secure and at the same time not unduly fetter the arm of the Government in the enforcement of law. The practical aspect of the problem is expressed with a good deal of force by the Supreme Court of California in *People* v. *Mayen*, 188 Cal. 237, as follows (p. 251):

> The constitution and laws of the land are not solicitous to aid persons charged with crime in their efforts to conceal or sequester evidence of their iniquity. From the necessity of the case the law countenances many devious methods of procuring evidence in criminal cases. The whole system of espionage rests largely upon deceiving and trapping the wrongdoer into some involun-

> tary disclosure of his crime. It dissimulates a way into his confidence; it listens at the keyhole and peers through the transom light. It is not nice, but it is necessary in ferreting out the crimes against society which are always done in darkness and concealment.

Even if the principle contended for by petitioners were accepted, the extent of its application in this case would be questionable. Two of the petitioners apparently did not participate in any conversation testified to upon the trial. The house taps were confined to three of the petitioners. Most of the conversations in question came from the office in the Henry Building. What right of privacy did the various petitioners have with respect to that office? The evidence does not show in whom the leasehold right was vested. It shows vaguely that six of the petitioners had a proprietary interest in the liquor business there conducted. The other thirteen, so far as can be deduced from the record, appear to be merely salaried employes. They had no personal interest in the office or its use. Their telephone conversations were in furtherance of their employer's business. Were their "persons, papers or effects" searched by the unauthorized listening to such conversations? It would be interesting to know just what the petitioners claim was searched. Certainly not their "papers." Was it their "persons," their "houses," or their "effects"? What was seized?

The telephone conversations were overheard, but they were not intercepted nor interfered with and a conversation may hardly be said to be "seized."

We are not defending wire tapping as a method proper generally to be used for detection of crime, although cases may be imagined where wire tapping would not arouse any resentment among good people. The Prohibition Unit of the Treasury disclaims it and the Department of Justice has frowned on it. No other recent case in the Federal courts has come to our attention in which officers of the United States have resorted to it. The question here is not one of governmental or departmental policy, but of constitutional law.

If, in any circumstances, obtaining evidence by tapping wires is deemed an objectionable governmental practice, it may be regulated or forbidden by statute, or avoided by officers of the law, but clearly the Constitution does not forbid it unless it involves actual unlawful entry into a house.

The judgment of the Circuit Court of Appeals should be affirmed.

Respectfully submitted.

WILLIAM D. MITCHELL,
Solicitor General.

MICHAEL J. DOHERTY,
Special Assistant to the Attorney General.

FEBRUARY, 1928.

○